

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

FILED

JUN 11 1981

H. STUART CUNNINGHAM, CLERK
UNITED STATES DISTRICT COURT

DOCKETED

80 C 5863 JUN 12 1981
Judge Decker

MIDWAY MFG. CO., a corporation,

Plaintiff,

vs.

ARTIC INTERNATIONAL, INC., a
corporation,

Defendant.

ARTIC INTERNATIONAL, INC., a
corporation,

Counterclaim Plaintiff,

vs.

MIDWAY MFG. CO., a corporation, and
BALLY MANUFACTURING CORPORATION, a
corporation,

Counterclaim Defendants.

ANSWER TO SECOND AMENDED
AND SUPPLEMENTAL COMPLAINT
FOR COPYRIGHT INFRINGEMENT,
TRADEMARK INFRINGEMENT,
UNFAIR COMPETITION, MIS-
APPROPRIATION, VIOLATION
OF 15 U.S.C. §1125(a),
AND VIOLATION OF ILL.
REV. STAT. CH. 121 1/2
§§311-317 AND COUNTERCLAIMS
FOR DECLARATORY JUDGMENT
OF COPYRIGHT INVALIDITY AND
NON-INFRINGEMENT, VIOLATION
OF THE ANTITRUST LAWS,
UNFAIR COMPETITION, AND
FALSE DESIGNATION OF ORIGIN

Defendant ARTIC INTERNATIONAL, INC., for its Answer to the Amended and Supplemental Complaint for Copyright Infringement, Trademark Infringement, Unfair Competition, Misappropriation Violation of 15 U.S.C. §1125(a), and Violation of Ill. Rev. Stat. Ch. 121 1/2 §§311-317, served on the 10th day of December 1980, admits, denies, and alleges as follows:

JURISDICTION

1. Answering Paragraph 1, Defendant denies the averment.
2. Answering Paragraph 2, Defendant denies the averment for lack of knowledge or information sufficient to form a belief as to the truth thereof, except that it admits that the Plaintiff, Midway, has a place of business at Franklin Park in the State of Illinois.
3. Answering Paragraph 3, Defendant admits the averment.
4. Answering Paragraph 4, Defendant denies the averment.

COPYRIGHT INFRINGEMENT

"Plaintiff's Copyrighted Galaxian Video Game"

4.a. Answering the quoted unnumbered averment, Defendant denies that Plaintiff's, or any game, is or can be in law covered by any copyright.

5. Answering Paragraph 5, Defendant denies the averments for lack of knowledge or information sufficient to form a belief as to the truth thereof. However, Defendant specifically denies that Galaxian or any video game, or any game, is copyrightable subject matter under the laws of the United States.

6. Answering Paragraph 6, Defendant denies the averment and specifically denies that any copyright can exist in a game per se under the laws of the United States, and thus denies that such could be assigned.

7. Answering Paragraph 7, Defendant denies the averment thereof.

8. Answering Paragraph 8, Defendant denies the averments thereof for lack of knowledge or information sufficient to form a belief as to the truth thereof.

9. Answering Paragraph 9, Defendant admits that no written license or assignment has ever been given to it by Plaintiff but denies the rest of the averments.

10. Answering Paragraph 10, Defendant denies the averments.

11. Answering Paragraph 11, Defendant denies the averments.

"Plaintiff's Copyrighted PAC-MAN Video Game"

11.a. Answering the above-quoted unnumbered statement, Defendant denies that the game is copyrightable or copyrighted or that such belongs to Plaintiff.

12. Answering Paragraph 12, Defendant denies the averments for lack of knowledge or information to form a belief as to the truth thereof. However, Defendant specifically denies that the mentioned game or any game is copyrightable subject matter under the laws of the United States.

13. Answering Paragraph 13, Defendant denies the averments and specifically denies that any copyright can exist in a game per se under the laws of the United States, and thus can be the subject of any assignment.

14. Answering Paragraph 14, Defendant denies the averments.

15. Answering Paragraph 15, Defendant denies the averments thereof for lack of knowledge of information sufficient to form a belief as to the truth thereof.

16. Answering Paragraph 16, Defendant admits that no written license or assignment has ever been given to it by Plaintiff but denies the rest of the averments.

17. Answering Paragraph 17, Defendant denies the averments.

18. Answering Paragraph 18, Defendant denies the averments.

19. Answering Paragraph 19, Defendant denies the averments.

20. Answering Paragraph 20, Defendant denies the averments.

21. Answering Paragraph 21, Defendant denies the averments.

22. Answering Paragraph 22, Defendant denies the averments.

23. Answering Paragraph 23, Defendant denies the averments.

24. Answering Paragraph 24, Defendant denies the averments.

25. Answering Paragraph 25, Defendant denies the averments.

26. Answering Paragraph 26, Defendant denies the averments.

27. Answering Paragraph 27, Defendant denies the averments.

28. Answering Paragraph 28, Defendant denies the averments.

29. Answering Paragraph 29, Defendant denies the averments.

30. Answering Paragraph 30, Defendant denies the averments.

31. Answering Paragraph 31, Defendant denies the averments.

Unfair Competition, Violation of the Illinois Deceptive Trade Practice Act. False Designation of Origin and Misappropriation

32. Answering Paragraph 32, Defendant admits that it has sold a "memory board" and that the first page of Exhibit E is an accurate, if badly made, copy of an advertisement placed by Defendant and the second page is a badly made copy of its instruction sheet enclosed with the product, but otherwise denies the averments of this paragraph

33. Answering Paragraph 33, Defendant denies the averments.

34. Answering Paragraph 34, Defendant denies the averments.

35. Answering Paragraph 35, Defendant denies the averments.

36. Answering Paragraph 36, Defendant denies the averments.

37. Answering Paragraph 37, Defendant admits that Exhibit F is a(poor quality) copy of one of its advertisements but otherwise denies the averments.

38. Answering Paragraph 38, Defendant denies the averments.

39. Answering Paragraph 39, Defendant denies the averments.

40. Answering Paragraph 40, Defendant denies the averments.

41. Answering Paragraph 41, Defendant denies the averments.

42. Answering Paragraph 42, Defendant denies the averments.

43. Answering Paragraph 43, Defendant denies the averments.

44. Answering Paragraph 44, Defendant denies the averments.

COUNT I

45. Answering Paragraph 45, Defendant re-alleges Paragraphs 1 through 43, inclusive, of this Answer.

46. Answering Paragraph 46, Defendant denies the averments.

COUNT II

47. Answering Paragraph 47, Defendant re-alleges Paragraphs 1 through 43, inclusive, of this Answer.

48. Answering Paragraph 48, Defendant denies the averments.

COUNT III

Unfair Competition

49. Answering Paragraph 49, Defendant re-alleges Paragraphs 1 through 43, inclusive, of this Answer.

50. Answering Paragraph 50, Defendant denies the averments.

COUNT IV

Violation of 15 U.S.C. §1125(a)

51. Answering Paragraph 51, Defendant re-alleges Paragraphs 1 through 43, inclusive, of this Answer.

52. Answering Paragraph 52, Defendant denies the averments.

COUNT V

Violation of the Illinois Deceptive Trade Practices Act, Ill. Rev. Stat.
Ch. 121 1/2 §§311 et seq.

53. Answering Paragraph 59(sic), Defendant re-alleges

Paragraphs 1 through 43, inclusive, of this Answer.
54. Answering Paragraph 54, Defendant denies the aver-
ments.

COUNT VI

Misappropriation

55. Answering Paragraph 55, Defendant re-alleges
Paragraphs 1 through 43, inclusive, of this Answer.
56. Answering Paragraph 56, Defendant denies the aver-
ments.

FIRST AFFIRMATIVE DEFENSE

COPYRIGHT INVALIDITY AND NON-INFRINGEMENT

57. Copyright Registration No. PA-59-977 is invalid
under Sections 101, 102, et seq. of Title 17, United States
Code, and has not been infringed.

SECOND AFFIRMATIVE DEFENSE

58. Copyright Registration No. PA-68-323 is invalid
under Sections 101, 102, et seq. of Title 17, United States
Code, and has not been infringed.

THIRD AFFIRMATIVE DEFENSE

59. Copyright Registration No. PA-83-768 is invalid
under Sections 101, 102, et seq. of Title 17, United States
Code, and has not been infringed.

FOURTH AFFIRMATIVE DEFENSE

Lack of Legal Title

60. The Plaintiff lacks legal title to the alleged

audiovisual (motion picture) work of copyright Registration
No. PA-59-977.

FIFTH AFFIRMATIVE DEFENSE

61. The Plaintiff lacks legal title to the alleged
audiovisual (motion picture) work of copyright Registration
No. PA-68-323.

SIXTH AFFIRMATIVE DEFENSE

62. The Plaintiff lacks legal title to the alleged
audiovisual (motion picture) work of copyright Registration
No. PA-83-768.

SEVENTH AFFIRMATIVE DEFENSE

UNCLEAN HANDS-FRAUD ON THE COPYRIGHT OFFICE application
63. The Plaintiff has, in making and prosecuting each/
for the copyright registrations here involved, made material
misrepresentation to and withheld pertinent information from the
the United States Copyright Office regarding authorship and
the date and circumstances of the making of its deposited
material.

64. That but for such material misrepresentation and
withholding of pertinent information, the Copyright Office
would not have issued the registrations involved.

65. That such behavior constitutes fraud on the Copy-
right Office and renders the copyrights here involved unen-
forceable because of Plaintiff's unclean hands in obtaining
such registrations.

EIGHTH AFFIRMATIVE DEFENSE

UNCLEAN HANDS-ANTITRUST LAW VIOLATION
ATTEMPTING TO MONOPOLIZE THE REPLACEMENT PART BUSINESS

66. That Plaintiff, in combination and conspiracy with Bally Manufacturing Corporation (Bally), is attempting to monopolize the trade in un-copyrighted and un-patented replacement parts for its manufactured machines, owned free and clear of any legitimate rights of Plaintiff or Bally, by independent third parties, by

(a) Threatening the Defendant and others with copyright litigation if they supply such parts (an example of such threats is reproduced as Exhibit 1 hereto), knowing that the copyright does not extend to such replacement parts;

(b) By bringing Civil Action against Defendant, and another, for selling such parts (Exhibit 2 is a copy of the original Complaint in this case);

(c) By publicizing this Civil Action after its filing to the trade in Reply Magazine;

(d) By attempting to "settle" such litigation by agreements that far exceed the scope of the claims set forth. (Exhibit 3 hereto is a copy of one such "settlement" offer to Defendant.)

67. Because of such violation of the Antitrust Law, the Plaintiff has unclean hands, and this Court should therefore withhold any relief from Plaintiff or its claims and dismiss them.

NINTH AFFIRMATIVE DEFENSE
UNCLEAN HANDS-ANTITRUST LAW VIOLATION
MARKET-SPLITTING

68. That the Plaintiff, in combination with Namco, Ltd. of Japan, the large Japanese potential competitor in the coin-operated video game business, has entered into a market-splitting agreement whereby Namco, Ltd. agreed not to export into the United States certain of its games, and the Plaintiff agreed not to export into Japan certain of its games in violation of the Antitrust Law of the United States. Two memorandums expressing part of this agreement are attached as Group Exhibit 4 hereto.

69. That this agreement uses the alleged copyrights here involved as a vehicle for such market-splitting.

70. Because of such violation, the Plaintiff has unclean hands, and this Court should withhold any relief from it.

TENTH AFFIRMATIVE DEFENSE

GENERICNESS OF GALAXIAN

71. That Galaxian is the generic name of a type of game and therefore not a trademark belonging to Plaintiff or anyone.

ELEVENTH AFFIRMATIVE DEFENSE

OWNERSHIP BY ANOTHER-DUAL USE

72. That any Common Law trademark rights in or associated with the mark GALAXIAN belong to the first user in the United States, which is acknowledged by Plaintiff to be

Namco, Ltd.

73. Because of this use by another prior to Plaintiff, and Plaintiff's co-use of the alleged mark, the alleged mark has become free of any claim of ownership and can be used freely by anyone.

TWELFTH AFFIRMATIVE DEFENSE

PRE-EMPTION

74. Common law Count VI is pre-empted by Federal Copyright and Patent Law.

THIRTEENTH AFFIRMATIVE DEFENSE

BEYOND MONOPOLY

75. That as to all Midway-made and sold machines capable of displaying the images of the alleged copyrighted motion picture or audiovisual works, having sold these machines and collected its compensation for the alleged copyrights from that sale, those works are beyond the copyright monopoly and Midway is not entitled to extract a second payment therefor or to control the use thereof by the owners of the machines.

76. As a consequence of the averments of Paragraph 75 neither is Midway able to extract a further payment from or to restrain in any way those such as Defendant who supply replacement parts to the owners of such machines.

FOURTEENTH AFFIRMATIVE DEFENSE

LICENSE

77. That as to all Midway machines made by and under authority of the alleged copyright owners, these machines carry with them, inherently, a license to perform the alleged copyrighted motion picture or audiovisual work.

78. That as to all Namco machines made by and under authority of the alleged copyright owners, these machines carry with them, inherently, a license to perform the alleged copyrighted motion picture or audiovisual work.

79. That as to all such machines referred to in Paragraphs 77 or 78 above, the machine owner may modify or edit the performance as he pleases, and such modification and editing is also licensed.

80. That Defendant can sell equipment and components to such owners identified in Paragraphs 77 or 78 free of any claim of copyright infringement.

FIFTEENTH AFFIRMATIVE DEFENSE

FAIR USE

81. That the modification by the owner of a machine is a permitted fair use of any audiovisual or motion picture allegedly copyrighted work related to the machine.

SIXTEENTH AFFIRMATIVE DEFENSE

NOT DIRECT INFRINGEMENT

82. That the Defendant's acts alleged in this Complaint do not constitute direct infringement, as defined in the Copyright Act, 17 U.S.C. §101 et seq.

83. That there is no indirect or contributory infringement of a copyright.

84. Therefore, Defendant can not be an infringer of the alleged copyrights.

SEVENTEENTH AFFIRMATIVE DEFENSE
VIOLATION OF PUBLIC POLICY EXPRESSED IN
MORTON SALT V. SUPPIGER

85. That the Plaintiff has extended the copyright monopoly beyond the limits permitted by the copyright laws and thereby violated the public policy expressed in the case of Morton Salt v. Suppiger, 314 U.S. 488, and should therefore be barred from enforcing it in this proceeding.

EIGHTEENTH AFFIRMATIVE DEFENSE
VIOLATION OF PUBLIC POLICY IN MISUSE OF
ASSERTED COPYRIGHTS AND OTHER RIGHTS

86. That the Plaintiff has in consort with NAMCO, Ltd. of Japan, misused the copyrights and other rights asserted by the Plaintiff herein by entering into license agreements between NAMCO, Ltd. and Plaintiff, wherein Plaintiff positively stated and agreed to not market its computer game machines in Japan, Taiwan, and other parts of the Far East, and NAMCO, Ltd. positively stated and agreed to not market its computer game machines in the United States.

87. That these positive agreements violate the public policy of the United States.

88. That the rights asserted here were misused in entering into such license agreements and therefore should not be enforced by this court.

COUNTERCLAIMS

Counterclaim Plaintiff, Artic International, Inc.,
hereinafter called Counterclaim Plaintiff, for their counter-
claims against Defendant, Midway Mfg. Co., a corporation,
hereinafter Midway, and Bally Manufacturing Corporation, a
Delaware corporation, hereinafter called Bally, allege as
follows:

89. Counterclaim Plaintiff is a New Jersey Corporation
having its principle place of business in New Jersey.

90. Counterclaim Defendant, Midway Mfg. Co., is on
information and belief an Illinois corporation having a prin-
ciple place of business in Franklin Park, Illinois within
the Northern District of Illinois.

91. Counterclaim Defendant, Bally Manufacturing Corporation,
is a Delaware corporation having a principle place of business
at 2640 West Belmont Avenue, Chicago, Illinois, within the
Northern District of Illinois.

92. Midway is, on information and belief, the wholly
owned subsidiary of Bally.

93. Midway manufactures a broad line of coin-operated
amusement arcade games, primarily electronic video games,
which it sells under the "Midway" name.

94. Bally, or its subsidiaries, including Midway, makes
many of the components used in its coin-operated amusement
arcade games and sells replacement parts for all of such
games it manufactures.

95. Bally and Midway are together the largest manufacturers of coin-operated amusement and gaming equipment.

96. Bally and Midway have established a policy of "establishing and maintaining a leading market position" in video games.

97. On information and belief, Midway sells the video game machines, directly or indirectly through Bally to customers who own and operate such products in locations for use by the public.

98. There are a substantial number of such video games made by Midway, owned by independent third parties.

99. The owners of such third party-owned machines often desire to buy and use replacement parts in those machines, and they do buy and use such parts in interstate commerce.

100. The replacement part business for "Midway" machines is a significant market in interstate commerce.

FIRST COUNTERCLAIM
DECLARATORY JUDGMENT OF COPYRIGHT AND TRADEMARK
INVALIDATION AND NON-INFRINGEMENT AND GAME "RIGHTS"

101. Counterclaim Plaintiff realleges Paragraphs 85 and 86.

102. This counterclaim arises under an Act of Congress relating to copyrights. The Court has jurisdiction under 28 United States Code Sections 1332, 1338(a), 2201 and 2202.

103. A case of actual controversy exists between Counterclaim Plaintiffs and Counterclaim Defendant, Midway. Midway has asserted ownership of Copyright Registration Nos.

PA-68-323; PA-59-977; and PA-83-768, ownership of alleged common law trademark "Galaxian" and ownership of unspecified "rights in the games known as Galaxian, Pac-Man (or Puck-Man), Rally-X, Space Zap and Space Encounters," and that Defendant is infringing such rights, registrations, and alleged common law trademark.

104. The alleged copyrights of Midway are invalid under

the Copyright Act, Title 17, Sections §101 et seq. United States Code, and the alleged infringed trademarks are not valid trademarks, and Midway has no valid "rights" in the games.

105. Counterclaim Plaintiffs have not infringed Copyrights PA 83-768, PA-68-823, and PA-59-977 nor infringed upon any valid common law trademark or other alleged "rights".

SECOND COUNTERCLAIM
FOR FALSE DESIGNATION OF ORIGIN

106. Counterclaim Plaintiff realleges Paragraphs 85 and 86.

107. This is a civil action in which the amount in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and is between citizens of different states. The court has jurisdiction under Section 1332 of Title 28, United States Code.

108. On information and belief, Counterclaim Defendant Midway has sold and caused to be used in commerce games that include a false designation of origin, namely, that include the word "NAMCO" in their Attract mode display and have

caused such products to enter into interstate commerce, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125a.

THIRD COUNTERCLAIM
FOR ANTITRUST VIOLATION

109. Counterclaim Plaintiff realleges Paragraphs 85-96, inclusive, and Paragraph 93 as if here fully set out. Counterclaim Plaintiffs reallege Paragraph 66 as if here fully set out.

110. As a result of the above acts, the Defendant has been harmed in its sales of replacement parts and otherwise.

111. Upon information and belief, Counterclaim Defendants, with intent to injure Counterclaim Plaintiffs, have threatened, maliciously and in bad faith, and are threatening, maliciously and in bad faith, customers and potential customers of Counterclaim Plaintiffs with infringement of their Copyrights PA-68-323, PA-59-977, and PA-83-768, and their alleged trademarks.

112. Upon information and belief, Counterclaim Defendants, with intent to injure Counterclaim Plaintiffs, have maliciously, in bad faith and without request, published, and caused to be published, to uninterested persons, the knowingly false, misleading and unprivileged statement that Counterclaim Plaintiffs are infringing of their copyrights and trademarks, and, with said intent, have maliciously and in bad faith published, and caused to be published, the knowingly false,

misleading and unprivileged statement that Counterclaim Plaintiffs have misappropriated property of Counterclaim

Defendants.

113. In doing the acts alleged in Paragraphs 105-108,

inclusive, Counterclaim Defendants have attempted, and are attempting, to monopolize the trade and commerce in replacement parts for Midway video game machines, among the several States, in violation of Section 2 of the Sherman Act,

15 U.S.C. §2.

114. As a proximate cause of the acts alleged, Counterclaim Plaintiffs have lost, and will lose, sales and have been and will be, damaged to an extent not yet known.

115. As a proximate cause of the threats and statements alleged in Paragraphs 107 and 108, Counterclaim Plaintiffs have been damaged, because said threats and statements impute to them dishonest, unlawful and reprehensible business conduct.

FOURTH COUNTERCLAIM FOR UNFAIR COMPETITION

116. Counterclaim Plaintiffs reallege Paragraphs 85 to 96, inclusive, and Paragraphs 107-111, inclusive.

117. The acts alleged in Paragraphs 107-111, inclusive, constitute unfair competition.

118. As a proximate cause of the acts alleged in Paragraphs 107-111, inclusive, Counterclaim Plaintiffs have lost, and will lose, sales, and have been, and will be, damaged to an extent not yet known.

119. As a proximate cause of the threats and statements

alleged in Paragraphs 107 and 108, Counterclaim Plaintiffs have been damaged, because said threats and statements impute to them dishonest, unlawful and reprehensible business conduct.

FIFTH COUNTERCLAIM FOR VIOLATION OF

ANTITRUST LAWS BY MARKET SPLITTING

120. Counterclaim Plaintiff realleges Paragraphs 89, 90, 91, 92 and 86.

121. That such conduct violates the Antitrust Law of the United States.

122. That Defendant was damaged by antitrust violation in the market for its replacement parts which was diminished by the lessening of sales of game machines that resulted from that agreement, and otherwise.

WHEREFORE, the Defendant and Counterclaim Plaintiff prays for the following:

1. That the Complaint be dismissed;
2. That United States Copyright Registration Nos. PA-68-323, PA-59-977, and PA-83-768 be declared invalid and not infringed;
3. For damages for violation of the antitrust laws of the United States, for unfair competition, and for false designation of origin, and a trebling of said damages;
4. For \$1,500,000 in punitive damages for business disparagement;
5. For reasonable attorney's fees;

6. For costs of suit incurred herein;
7. For such other and further relief as to the Court
may seem just and the circumstances warrant.

DEFENDANTS AND COUNTERCLAIM PLAINTIFFS DEMAND A JURY
TRIAL ON ALL ISSUES RAISED IN THE COMPLAINT AND ANSWER AND ON
ALL ISSUES RAISED IN THE FIRST, SECOND, THIRD, FOURTH, AND
FIFTH COUNTERCLAIMS.

DATED: June 11, 1981.

ARTIC INTERNATIONAL, INC.

By Richard G. Kinney
Richard G. Kinney
Kinney & Niblack
Attorneys for Defendant

55 E. Jackson Blvd.
Suite 1645
Chicago, Illinois 60604
(312) RAndolph 6-3966

RECEIVED

OCT 31 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Mark Cunningham, Clerk
United States District Court

MIDWAY MFG. CO., a corporation,

plaintiff,

vs.

ARTIC INTERNATIONAL, INC., a
corporation,

Defendant.

) COMPLAINT FOR COPYRIGHT
) INFRINGEMENT, TRADEMARK
) INFRINGEMENT, AND
) UNFAIR COMPETITION

DOCKETED 12-4-80

TO CLIENT

Plaintiff MIDWAY MFG. CO. complains of the above-named
defendant as follows:

COUNT I

(Copyright Infringement)

1. This claim arises under the copyright laws of the
United States, 17 U.S.C. § 101 et seq. Jurisdiction is
conferred upon the Court by 28 U.S.C. §§ 1332 and 1338.

2. At all times herein mentioned, plaintiff Midway
Mfg. Co. ("Midway") has been, and now is, a corporation duly
organized and existing under the laws of the State of Illinois
with its principal place of business in the State of Illinois.

3. At all times herein mentioned, defendant Artic
International, Inc. has been, and now is, a New Jersey

EXHIBIT
2

corporation with a principal place of business at 550 Route 22,
Bridgewater, New Jersey.

4. Defendant has been transacting business, including
the acts complained of herein, in this District.

5. In or about 1979 Namco Limited ("Namco") a
Japanese corporation, devised and created an electronic video
game entitled GALAXIAN. GALAXIAN contains a large amount of
audiovisual material wholly original with Namco and is
copyrightable subject matter under the laws of the United
States.

6. As of November 13, 1979, Namco assigned to Midway
all of Namco's right, title and interest in and to copyrights
in GALAXIAN in the United States.

7. Midway has complied in all respects with all laws
governing copyrights, and secured the exclusive rights in and
to the copyrights in GALAXIAN, and has received from the
Register of Copyrights certificates of registration dated and
identified as follows: March 6, 1980, No. PA 59-977, and June
4, 1980, No. PA 68-323. True and correct copies of
registration certificates no. PA 59-977 and PA 68-323 are
appended hereto as Exhibit "A" and are incorporated herein as
though set forth in full.

8. Midway duly recorded with the Copyright Office a document memorializing the assignment referred to in paragraph 6 of this Complaint on or about March 6, 1980. A true and correct copy of the recordation certificate for this assignment is appended hereto as Exhibit "B" and is incorporated herein as though set forth in full.

9. Neither Namco nor Midway has ever granted to defendant or any other person or entity a license or assignment of any rights in GALAXIAN subsisting under the copyright laws of the United States.

10. At all times herein mentioned Midway has been and still is the proprietor of all right, title and interest in and to the United States copyrights in GALAXIAN.

11. Defendant has since prior to this Complaint and at least in October, 1980, offered for sale and sold apparatus especially made or adapted for use with other apparatus to publicly perform GALAXIAN and has knowingly caused GALAXIAN to be adapted and publicly performed in the United States by creating, importing and distributing an electronic video game component, which component coacts or is intended to coact with other apparatus, to produce audio-visual material that is copied largely from GALAXIAN.

12. Midway has notified defendant that defendant has infringed Midway's copyrights in GALAXIAN and defendant has continued to infringe the said copyrights.

13. By reason of defendant's aforesaid infringements and threatened infringements of said copyrights, Midway has sustained, and will continue to sustain, substantial injuries, loss, and damage to its ownership rights in GALAXIAN.

14. Defendant's acts as hereinabove alleged infringe and threaten further to infringe the copyrights in GALAXIAN. Further irreparable harm and injury to Midway are imminent as a result of defendant's conduct, and Midway is without an adequate remedy at law.

15. Midway is entitled to recover from defendant the damages sustained by Midway as a result of defendant's wrongful acts as hereinabove alleged. Midway is presently unable to ascertain the full extent of the monetary damages it has suffered by reason of defendant's aforesaid acts of copyright infringement, but Midway is informed and believes, and on the basis of such information and belief alleges, that Midway has sustained such damages in an amount exceeding \$50,000.

16. Midway is further entitled to recover from defendant the gains, profits and advantages defendant has obtained as a result of its wrongful acts as hereinabove

alleged. Midway is presently unable to ascertain the full extent of the gains, profits and advantages defendant has obtained by reason of its aforesaid acts of copyright infringement, but Midway is informed and believes, and on the basis of such information and belief alleges, that defendant has obtained such gains, profits and advantages in an amount exceeding \$50,000.

COUNT II

(Trademark Infringement)

17. Since November, 1979, a date well prior to any acts of defendant complained of herein, Midway has engaged in extensive sale and distribution of a video game under the mark GALAXIAN in and throughout the United States, including the State of Illinois. To date, Midway has sold well over 30,000 GALAXIAN video games, and its gross revenues for the sale of such games has exceeded 50 million dollars. Midway's GALAXIAN video game has been widely advertised and promoted through trade publications and by exhibition at numerous trade shows.

18. As the result of the widespread sales, advertising and promotion of the GALAXIAN game, well prior to the acts of defendant complained of herein, the trademark GALAXIAN acquired

"secondary meaning", i.e., it has become identified by members of the public and those in the trade as identifying a video game which emanates from a single source.

19. As a further result of the widespread sales, advertising and promotion of the GALAXIAN game, and well prior to the acts of defendant complained of herein, Midway acquired substantial goodwill as the source of the GALAXIAN video game.

20. By reason of the widespread use of the GALAXIAN trademark Midway is the exclusive owner of the mark GALAXIAN as applied to merchandise of the same general character as Midway's game and game components to which the mark has been applied. The exclusive ownership by Midway of the GALAXIAN mark has been generally recognized in the trade.

Infringement Of The
GALAXIAN Trademark

21. On information and belief, some time after Midway had acquired its goodwill in its GALAXIAN trademark, and without the knowledge or consent of Midway and in reckless disregard of Midway's rights, defendant adopted and commenced to use the trademark GALAXIAN in connection with the sale of video game components.

22. On information and belief, defendant had knowledge of Midway's extensive use of its GALAXIAN trademark, and adopted the GALAXIAN mark with the intent to unlawfully benefit from the goodwill associated with Midway's GALAXIAN mark, to deceive the public, to damage Midway and to unjustly enrich defendant at the expense of Midway and the public.

23. The intentional unauthorized use by defendant of plaintiff's GALAXIAN mark and logotype in connection with the sale and advertising for sale by defendant of defendant's video game components is likely to cause confusion and mistake and to deceive the purchasing public into believing that defendant's video game components are somehow made by, licensed by, associated with, sponsored by, backed by or connected with Midway, all to Midway's damage.

24. Plaintiff has been damaged by defendant's acts herein complained of, and the defendant has profited thereby, to an extent at present unknown to the plaintiff. Unless the defendant's conduct complained of herein is temporarily restrained, and preliminarily and permanently enjoined, the plaintiff and its goodwill and reputation will suffer irreparable injury which cannot be adequately calculated or compensated in damages.

25. The defendant's aforesaid acts constitute trademark infringement in violation of plaintiff's trademark rights at Common Law.

26. The defendant's aforesaid acts constitute unfair competition with the plaintiff in violation of the plaintiff's rights at Common Law.

ON COUNT I

1. That defendants, their agents and servants be enjoined preliminarily during the pendency of this action and permanently thereafter from infringing Midway's copyrights in GALAXIAN in any manner, and from selling, marketing, distributing or otherwise disposing of any units of the electronic video game components offered for sale under the name GALAXIAN.

2. That defendant be required to deliver to the Court to be impounded during the pendency of this action all such electronic video game components and other material, which are in its possession or control, as are herein alleged to infringe Midway's copyrights in GALAXIAN.

3. That defendant be required to account for and pay over to Midway all the profits which defendant has derived from

the infringement of Midway's copyrights in GALAXIAN and to pay such damages to Midway as to this Court shall appear just and proper within the provisions of the copyright laws, but not less than \$250.00 for each separate infringement.

4. That defendant pay to Midway the costs incurred herein, including reasonable attorneys' fees, as provided by the copyright laws.

5. That Midway have such other or further relief as the Court deems just and proper.

ON COUNT II

1. That the plaintiff has the exclusive right to use the word GALAXIAN (including any simulation thereof) as a trademark in connection with the manufacture and sale of video games or components thereof and other merchandise of the same general character.

2. That the defendant has infringed upon the trademark rights of the plaintiff and has unfairly competed with the plaintiff by using the word GALAXIAN as a trademark in connection with the sale of video game components.

3. That said defendant, its officers, agents, employees, and attorneys, and all acting under or through them,

be temporarily restrained, and preliminarily and permanently enjoined from making further use of the mark GALAXIAN, or any other name or mark confusingly similar to plaintiff's trademark and name GALAXIAN.

4. That defendant be ordered and directed to remove the name GALAXIAN from their goods and from all signs, stationery, advertising and promotional material, and the like, and from the premises of any business operated by defendant, and to surrender to plaintiff for destruction all tags, labels, signs, prints, packaging, stationery, and advertising and promotional material which incorporates or uses the word or name GALAXIAN.

5. That defendant pay any damages sustained by plaintiff.

6. That plaintiff recover defendant's profits resulting from the aforesaid unfair competition and trademark infringement.

7. That defendant pay an award of plaintiff's costs and attorneys' fees in this action. }

8. That plaintiff have such further or additional relief as the Court may deem just and proper.

MIDWAY MFG. CO.

Donald L. Welsh

A. Sidney Katz
Donald L. Welsh
Fitch, Even, Tabin,
Flannery & Welsh
135 South LaSalle Street
Chicago, Illinois 60603
(312) 372-7842

Attorneys for Plaintiff

October 31, 1980

FITCH, EVEN, TABIN, FLANNERY & WELSH

SUITE 900 • 135 SOUTH LA SALLE STREET

CHICAGO, ILLINOIS 60603

TELEPHONE (312) 372-7842

CABLE ADDRESS "PATLAW"

TELEX 20 6566 PATLAW CGO

FOUNDED IN 1859 AS
GOODWIN, LARNED & GOODWIN

WILLIAM E. ANDERSON
OF COUNSEL

CALIFORNIA OFFICE

SUITE 1300
625 MARKET STREET
SAN FRANCISCO, CALIF. 94105
TELEPHONE (415) 777-4690

JULIUS TABIN
J. BRUCE MCCUBBREY
JOHN A. BUCHER
DONALD L. BARTELS
ADMITTED TO CALIFORNIA BAR

ORGAN L. FITCH, JR.
ANCIS A. EVEN
JULIUS TABIN
JOHN F. FLANNERY
ROBERT A. SCHUMACHER
ROBERT B. JONES
DONALD L. WELSH
JAMES J. SCHUMANN
STEVEN PINKSTAFF
BRUCE MCCUBBREY
JAMES J. HAMILL
SIDNEY KATZ
JAMES J. MYRICK
ROGER D. GREER
JOHN A. BUCHER
RICHARD L. WOOD
HILLIP H. WATT

JEROLD B. SCHNAYER
WAYNE E. NACKER
ERIC C. COHEN
DONALD L. BARTELS
JACK L. URNETSKY
TIMOTHY E. LEVSTIK

* ADMITTED TO CALIFORNIA BAR ONLY

November 14, 1980

Jack Trombadore, Esq.
311 S. Main Street
Manville, New Jersey 08835

Re: Midway Mfg. Co. v.
Artic International, Inc.
Our File No. 39819

Dear Mr. Trombadore:

Pursuant to our recent telephone conversation, we have prepared and enclose herewith the original and two copies of JUDGEMENT, DECREE AND ORDER and SETTLEMENT AGREEMENT with respect to the above-identified litigation. If you approve of the papers, would you please see that they are executed by Mr. Huang and you and return them to us for execution by Midway and filing of the JUDGEMENT, DECREE AND ORDER in the Court. Then, we will return executed copies to you.

At the A.M.O.A. show here in Chicago, Midway purchased a "Fast Galaxian" board from Mr. Samuel Lin at the Artic booth at the show for \$500.00 in cash. Although this is not mentioned in the Settlement Agreement, we believe it is appropriate for Artic to accept return of the board and refund the \$500.00 purchase price to Midway. Therefore, when you return the papers, please include a check for \$500.00 for the refund. Then, when we return the executed copies to you, we will return the Fast Galaxian board.

EXHIBIT

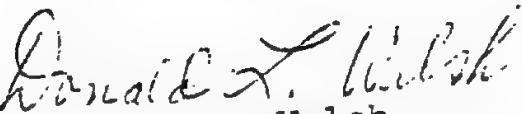
Jack Trombadore, Esq.

November 14, 1980
Page 2

The answer to the Complaint in the suit here is due on November 20. Hopefully, the papers can be executed and returned to us for filing of the JUDGEMENT, DECREE AND ORDER by that date.

Very truly yours,

FITCH, EVEN, TABIN, FLANNERY
& WELSH

By: 
Donald L. Welsh

DLW:bap
Encls.

SETTLEMENT AGREEMENT

This Settlement Agreement by and between
MIDWAY MFG. CO. ("Midway") and ARTIC INTERNATIONAL, INC.
("Artic"), is made with reference to the following facts:

A. Midway owns all rights in the United States
to Galaxian, Pac-Man (or Puck-Man), Rally-X, Space Zap,
and Space Encounters video games, such rights including
copyrights and trademark rights.

B. Artic has offered for sale and is capable of
producing and/or offering for sale either as separate parts
or parts of complete games, printed circuit boards or other
components of video games, especially adapted for use in
building video games or converting existing video games
to games which infringe Midway's rights in the games known
as Galaxian, Pac-Man (or Puck-Man), Rally-X, Space Zap, and
Space Encounters.

C. Midway filed suit against Artic on October 31,
1980, in the United States District Court for the Northern
District of Illinois, Eastern Division, such suit being titled
Midway Mfg. Co. v. Artic International Inc., Civil Action
No. 80 C 5863, for copyright infringement, trademark infringement
and unfair competition in respect to Midway's rights in
and to the Galaxian video game.

D. In order to avoid the expense incident to
litigating the issues between the parties hereto, the parties
have settled and compromised their differences.

NOW, THEREFORE, in consideration of the foregoing recitals and the respective covenants hereinafter contained, the parties hereto agree as follows:

1. Concurrently with the execution by the parties hereto of this Settlement Agreement, the parties shall execute a JUDGEMENT, DECREE AND ORDER in the form and substance of that attached hereto as Exhibit "A", and shall cause the same to be filed in the aforesaid action.

2. Artic agrees that, henceforth from the date of this Agreement, it will refrain from the manufacture and/or sale or offering for sale in the United States, either as separate parts or parts of complete games, printed circuit boards or other components of video games especially adapted for use in building video games or converting or modifying existing video games to games which infringe Midway's rights in the games known as Galaxian, Pac-Man (or Puck-Man), Rally-X, Space Zap and Space Encounters.

3. In the event that Midway files suit against Artic for breach of this Agreement and a court of competent jurisdiction finds that Artic has breached the Agreement by the manufacture, sale or offering for sale of one or more video games or components thereof, Artic agrees to pay Midway liquidated damages of \$400.00 for each such game or

component as well as Midway's expenses incurred in connection with the suit including attorney's fees and costs except with respect to Galaxian which is the subject of a consent judgment in the aforementioned action.

MIDWAY MFG. CO.

Date: _____

By: _____

ARTIC INTERNATIONAL, INC.

Date: _____

By: _____

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MIDWAY MFG. CO., a corporation,)
Plaintiff,)
No. 80 C 5863
v.)
ARTIC INTERNATIONAL, INC.,)
Defendant.)

JUDGEMENT, DECREE AND ORDER

Upon consent of the parties, and good cause
appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as

follows:

1. This Court has jurisdiction of the subject matter hereof and of plaintiff and defendant. The complaint states claims against said defendant upon which relief may be granted under 17 U.S.C. § 101 et seq., commonly known as the Copyright Act, and under the common law of Illinois relating to trademark infringement and unfair competition.
2. The provisions of this Order shall be applicable to defendant, its agents, servants, employees, attorneys in fact, and all other persons, firms, corporations or business associations acting by, with, from, through or under defendant's authority, direction or control who receive actual notice of this Order by personal service or otherwise.

3. Plaintiff is the proprietor of all right, title and interest in and to the trademark GALAXIAN as used in connection with amusement apparatus including but not limited to video games and components thereof, and in and to the following valid and subsisting United States copyrights:

- a. PA 59-977.
- b. PA 68-323.

4. Defendant and its agents, representatives, employees, and servants and all persons, firms, corporations or business associations acting by, with, from, through or under their authority, direction and control are hereby permanently enjoined from copying, reproducing, adapting, publicly performing and publicly displaying any of the copyrighted works enumerated in paragraph 3 of this Order or any portions thereof, and from publishing, selling, marketing, renting, leasing, lending, exchanging, distributing, or otherwise disposing of any copies of such works or any portions thereof, and from in any manner infringing or contributing to or participating in the infringement by others of any of the copyrights enumerated in paragraph 3 of this Order and from acting in concert with, aiding, inducing or abetting others to infringe any of said copyrights in any way. Defendant is specifically enjoined from publishing, selling, marketing, renting, leasing, lending, exchanging, distributing or otherwise disposing of any units of that certain video game known

as GALAXIAN, or any printed circuit board or other component or the game, including but not limited to the so-called "speed-up" device or other components for creation of or conversion to a GALAXIAN game; and from acting in concert with, aiding, inducing or abetting others to do same.

5. Defendant and its agents, representatives, employees, and servants and all persons, firms, corporations or business associations acting by, with, from, through or under their authority, direction and control are hereby permanently enjoined from using the name GALAXIAN or any confusingly similar term on or in connection with the sale, publication, marketing, rental, leasing, lending, exchange, distribution or other disposal of any video games or components thereof, including but not limited to so-called "speed-up" devices or other components for creation or conversion of any video game, and from in any manner infringing, contributing to, participating in, or inducing the infringement by others of the trademark GALAXIAN, or from in any manner competing unfairly with plaintiff in respect to the GALAXIAN video game.

6. In the event that any of the persons enjoined and restrained by this Order shall in any manner violate or breach any of the terms hereof, plaintiff may apply to this Court for relief and shall recover the sum of \$10,000 as damages, and not as a penalty, for each such violation or breach, without prejudice to such other and further relief

as the Court may deem just and proper in the circumstances
or to which plaintiff may be entitled by law.

7. In the event that any of the persons enjoined
and restrained by this Order shall in any manner violate or
breach any of the terms hereof, plaintiff may apply to this
Court for relief and shall recover all materials in said
person's possession which have been utilized in any such
violation or breach, without prejudice to such other and
further relief as the Court may deem just and proper in
the circumstances or to which plaintiff may be entitled by
law.

8. In the event that any of the persons enjoined
and restrained by this Order shall in any manner violate or
breach any of the terms hereof, plaintiff may apply to this
Court for relief and shall recover its actual costs and
attorneys' fees incurred in preparing said application, with-
out prejudice to such other and further relief as the Court
may deem just and proper in the circumstances or to which
plaintiff may be entitled by law.

9. Jurisdiction is retained by this Court for the
purpose of enabling any of the parties to this Order to apply to
this Court at any time for such further orders or directions
as may be necessary or appropriate for the interpretation or
implementation hereof, for the amendment or modification hereof.

for the enforcement of compliance herewith, or for the punishment of violations hereof.

10. The parties having compromised their differences, there shall be no award of or accounting for profits or damages against defendant.

11. No costs or attorneys fees are assessed against either party.

Dated: _____

UNITED STATES DISTRICT JUDGE

Consent is hereby given to the making and entry of the foregoing Judgement, Decree and Order.

ARTIC INTERNATIONAL, INC.

Dated: _____

By: _____
Sming Huang, President

Dated: _____

By: _____
Jack Trombadore
311 S. Main Street
Manville, New Jersey 08835
(201) 722-4500
Attorney for Defendant

Dated: _____

By: _____
Donald L. Welsh
A. Sidney Katz
Fitch, Even, Tabin, Flannery & Welsh
135 South LaSalle Street
Chicago, Illinois 60603
(312) 372-7342
Attorneys for Plaintiff

2
1
namco
NAMCO LIMITED

2-8-5, TAMAGAWA, OHTA-KU, TOKYO, 146, JAPAN
TELEPHONE: TOKYO 736-7311
CABLE ADDRESS: "GAMICHAIR" TOKYO
TELEX: 2106271

vol. 1773 page 106

ASSIGNMENT

Effective as of November 13, 1979, Namco Limited, a corporation of Japan having its principal place of business at 2-8-5 Tamagawa, Ohta-ku, Tokyo 146, Japan, author and proprietor of all right, title and interest in common law and statutory copyright in the United States and in the western hemisphere in and to a certain coin operated amusement game known as "Galaxian" which was first published in Japan on July 17, 1978, 1979, has assigned to and does hereby assign to Midway Mfg. Co., a corporation of the state of Illinois with offices at 10750 West Grand Avenue, Franklin Park, Illinois, the entire right, title and interest in common law and statutory copyright in and to said Galaxian game in the United States and the western hemisphere.

Dated: Feb 2, 1980

By: J. H. Edwards
Namco Limited

EXHIBIT

namco

NAMCO LIMITED
2-8-5, TAMAGAWA, OTA-KU, TOKYO, 146, JAPAN
TELEPHONE: TOK 739-2211
CABLE ADDRESS: "NAMCO-LTD" TOKYO
TELEX: 3466521

VOL.1814; PAGE 056

ASSIGNMENT OF COPYRIGHTS

Effective as of Aug. 16, 1980, Namco Limited, a corporation of Japan having its principal place of business at 2-8-5 Tamagawa Ohta-Ku, Tokyo 146, Japan, author and proprietor of all right, title and interest in common law and statutory copyrights in the United States and in The Western Hemisphere in and to a certain coin-operated amusement game known as "Pac-Man", or "Puckman" which was first published in Japan on May 22, 1980 has assigned to and does hereby assign to Midway Mfg. Co., a corporation of the State of Illinois, with offices at 10750 West Grand Avenue, Franklin Park, Illinois, the entire right, title and interest in common law and statutory copyrights in and to said game in the United States and The Western Hemisphere.

Date Aug. 16, 1980

NAMCO LIMITED

By Shigeo Konami (Title)
PRESIDENT

EXHIBIT